IN THE HIGH COURT OF BOMBAY AT GOA
*****

WRIT PETITION NO. 117 OF 2000

Ricardina Noronha (since deceased) through her following legal heirs:-

(A) Mr. Francisco Jose de Conceicao de Silva Noronha, s/o deceased, married to (A)(1) Maria Teresa da Silva Faria de Noroha, both r/o Macau at office address: Ave Alm. Riveiro No.1-0 1., MACAU,

(B) Mr. Fernando Victor Wolfango da Silva de Ataide e Teive de Noronha, s/o deceased, divorcee, r/o Lisbon, Portugal,

(C) Mrs. Maria Gabriela de Noronha Pereira de Costa, (expired on 5.11.1995) d/o deceased and her husband Atonio Pereira da Costa who expired on 14.7.2000 through legal heirs:

(C1)(i) Maria da Conceicao de Noronha Pereira da Costa Victoria Lopes, daughter, married to

(C1)(ii) Jose Manuel Vitoria Lopes, both r/o Rua Antonio, Stamp No.3, r/o esq. Lisboa, Portugal,

(C2)(i) Isabel Maria de Noronha Pereira da Costa Silva,daughter, married to

(C2)(ii) Antonio Jose Pereira da Silva, both r/o Rua Joao de Deus Ramos No.5., 4, Esq., Lisboa, Portugal,

(C3)(i) Maria de Lourdes Noronha Pereira da Costa Ferreira, daughter, married to -

(C3)(ii) Antonio Aguiar

Ferreira, both r/o Rua
Carlos Mardel No.11, 1 Dto.,
Lisboa, Portugal,

(C4)(i) Francisco Antonio
de Noronha Pereira da Costa,
son, married to -

(C4)(ii)Maria Joao Ferreira
Franco Lopes Pereira da Costa,
both r/o Rua Jacinto Nunes
No.11, 2 Dto., Lisboa,
Portugal,

(C5) Fernando Xavier de
Noronha Pereira da Costa,
son, single, r/o Rua Joao
de Deus Ramos No.5, 4, Esq.,
Lisbao, Portugal,

(1) Maria Alice da Silva de
Noronha e Oliveira, daughter
of deceased married to (D)(1)
Fernando Artur Peixoto de
Oliveira, both r/o Rua Jacinto
Nunes NO.11, 3 Esq. - 1170,
Lisbon, Portugal. ... Petitioners.

Versus

1. State of Goa, through
   Chief Secretary,

2. Custodian of Evacuee
   Property, with its office
   at Panaji,

3. Antonio Sequeira Coutinho
   Pereira, legal representa-
   tive of Maria Elsa, r/o
   Mayem, Bicholim, Goa. ... Respondents.

Mr. Bomi Zaiwalla and Mr. Fredum Devetri, Senior Advocates with Mr. Iftikhar Agha and Ms. Swati Kamat, advocates for the petitioners.

Mr. A.N.S. Nadkarni, Advocate General with Mr. H. D. Naik, Addl. Govt. Advocate for respondent no.1.

Mr. S. R. Rivonkar, advocate for respondent no.2.

Mr. S. K. Kakodkar, Senior Advocate with Mr. Joel D'Souza, advocate for respondent no.3.

CORAM : B. H. MARLAPALLE &
N. A. BRITTO, JJ.

DATE OF RESERVING THE JUDGMENT : 7th December, 2004.

DATE OF PRONOUNCING THE JUDGMENT : 22nd December, 2004.

JUDGMENT (Per Marlapalle, J.)

This petition filed under Article 226 of the Constitution of India takes exception to the Order dated 14th February, 2000, passed by the Under Secretary (Home), Government of Goa, by which the earlier Order dated 21st April, 1999 passed by the Custodian of Evacuee Property came to be revoked.

2. Mr. Jose Joaquim de Noronha was the Count of Mayem and was married to Filomena Correia Noronha. The couple had six children (two sons and four daughters). Filomena died in 1903. It appears that Mr. Jose Joaquim had grandchildren through his son Dr. Francis Antonio who was married to Ricardina. On the demise of Filomena Correia Noronha, the Countess of Mayem, Mr. Jose Joaquim de Noronha instituted inventory proceedings under registration no.957/1929 and the share of his late wife came to be divided amongst all other legal representatives and his own half share initially he retained to himself, but subsequently willed it (by will dated 17th/18th April, 1929), in favour of his grandson Eurico Antonio Silva, the son of Dr. Francisco Antonio Wolfango Silva. Eurico had four other brothers by name Dr. Francisco Wolfango de Silva, Dr. Abel de Silva, Raul Wolfango de Silva and Dr.

Fernando Wolfango de Silva. Dr. Fernando Wolfango de Silva was married to Maria Elsa Wolfango de Silva. Eurico begot four children who have subsequently come on record as petitioners.

3. The inventory proceedings no.957/1929 were concluded by Consent Terms drawn on 20th June, 1930 and Clause 11 of the said Consent Terms read as under:-

> "The parties mentioned in toto the testamentary disposition and jointly agree that in respect of Chapel of Our Lady of Miracles and the spring existing in Mayem be reserved for use of all heirs and further agree that in case the first party Eurico decides to sell the property in which the spring is located, he shall pay to the other interested parties the part of the price of the said spring proportionate to the hereditary share which shall be fixed by arbitration in absence of any agreement. In case said Eurico sells other properties of Mayem and is not living there, the Chapel referred to above shall be handed over for administration to "Cabido de See Primacial" with all the properties and belongings."

4. The entire property at Mayem was thus divided in two parts, namely the northern part and the southern part, both having been separated by a line drawn as described in Clause 6 of the Consent Terms in the inventory proceedings and represented in the plan annexed thereto. The southern part was willed to Eurico in toto and the northern part was left as a joint property amongst all the legal heirs and in the same the right of Fernando

Wolfongo de Silva and his wife Maria Elsa was to the extent of 1/36th share. Fernando Wolfongo de Silva had no right in respect of the southern half. The present respondent no.3 claims to represent Maria Elsa on the ground that her share in the property of the Count was sold to him after the demise of Fernando in 1989.

5. Some of the legal representatives of the Count were declared as evacuees by the Custodian vide his Order dated 25th June, 1965 and consequently their properties as evacuee properties. Dr. Fernando de Noronha Wolfango de Silva and his wife Maria Elsa had filed an appeal against the said declaration. Simultaneously Ricardina, Maria Manuela and Alice also had filed appeals. The appeals were allowed by Orders dated 30th July, 1966 and 23rd July, 1966, respectively and the entire case was remanded for deciding it afresh. Eurico and other legal heirs had left Goa after its liberation and only Dr. Fernando De Silva and his wife Maria Elsa continued to stay in Goa. Written Statement on behalf of Eurico Noronha was submitted on 6th July, 1965, before the Custodian and it opposed the proceedings initiated under Section 5 of the Goa Administration of Evacuee Property Act, 1964 (for short "the Evacuee Act"). However, before the proceedings were decided on remand he died on 6th May, 1965. After hearing all the parties concerned, the Custodian by his fresh Order dated 14th November, 1967,

held that all the successors in interest of the late Eurico, Mrs. D. Maria Helena, Mrs. D. Maria Amelia, Mr. D. Francisco Cristovao and his wife D. Alice, Jose de Noronha, Dr. Francisco Antonio and his wife D. Filomena Conceicao were evacuees and their properties were declared as evacuee property. The Custodian further ordered as under:-

> "I accordingly hold that the southern half of the property exclusively belongs to Mr. Eurico de Noronha de Silva and the same is now exclusive Evacuee Property. It is further held that in the northern half 35/36 shares is evacuee property belonging to the evacuee mentioned above..... Dr. Fernando and his wife Mrs. Maria Elsa Filomena have got only 1/36 shares in the northern half of the property. They shall surrender possession of all the evacuee property in their possession and also submit an account of the income of the evacuee property which is in their management until now."

6. Inventory proceedings No.7/79 were instituted regarding the common property to the extent of 35/36th share in the northern half of Mayem and the respondent no.3 had made an application on 2nd May, 1980 seeking directions against the Custodian not to effect payment to the petitioner. On 19th July, 1980, there was an agreement between the parties so as to modify the ex parte order dated 2nd July, 1980. Some of the terms of this consent order are as under:-

> "I. The parties have no objection that Mrs. Ricardina Emilia Guedes de Almeida Osorio da Silva de Noronha be paid upto Rs.7,00,000/- by the said Custodian of Evacuee Property out of the amount lying with the said Custodian of Evacuee Property which will be adjusted against the income of the southern part and any other properties belonging to the late Eurico da Silva;
>
> II. The parties have agreed that the application be paid by the said Custodian the amount corresponding to 1/36 share in the northern part as fixed by his order dated October 14, 1967."

The said application was rejected on 2nd July 1987, as the Court held that it did not have jurisdiction to entertain it.

7. The original petitioner Ricardina obtained Indian Nationality by naturalization on 21st April, 1993, and the southern half of the property of her husband Eurico was partitioned between her and her children vide Partition Deed dated 9th December, 1993 under registration no.779/93 dated 31st December, 1993. In June, 1993, Mrs. Maria Elsa filed Special Civil Suit NO.154/93 in the Court of the Civil Judge, Senior Division at Panaji for a declaration that Eurico would not be entitled for the entire southern half of the property as he failed to maintain the terms of the Will dated 17th/18th April, 1929. On 11th May, 1995, Ricardina submitted an application to the Custodian for restoration of the southern half of the property in her possession. It appears that the Custodian had issued notices for enquiry

in response to the said application. Maria Elsa had also filed an application for injunction, i.e. C.M.A. 271/93, which was allowed by the Civil Judge, Senior Division, vide his Order dated 23rd October, 1997, whereby temporary injunction against Ricardina restraining her from transferring or alienating any part of the southern half of the property was ordered. Prof. Maria Elsa moved Special Civil Suit No.1/96 on 2nd January, 1996, for permanent injunction against the Custodian of Evacuee Property, restraining him from releasing the property in favour of Ricardina. The trial Court granted ex parte injunction on the same day. The Custodian raised preliminary objection relating to the maintainability of the suit in view of Section 37 of the Act and after hearing both the parties, the said application was rejected by Order dated 19th February, 1996. This Order was challenged by the Custodian in C.R.A. NO.54/96 before this Court and the same was dismissed on 18th February, 1997. Prof. Maria Elsa was granted liberty to file objections before the Custodian within four weeks and it was noted that the Custodian would be free to proceed with the application of Ricardina for restoration, except for the title dispute relating to the suit property in case it so arose before him in the said proceedings.

8. By Order dated 16th September, 1997, the restoration application dated 11th May, 1995, came to be

disposed as not maintainable with liberty to Ricardina to file suitable application at the appropriate time. This Order was passed by the Custodian of Evacuee Property. It was noted by the Custodian that as dispute to the title of the property was pending in Special Civil Suit No.154/93, application for restoration was not maintainable. Ricardina submitted a fresh application for restoration on 9th January, 1998 for reconsideration of the Order dated 16th September, 1997. Notices were issued to all the concerned parties by the Custodian. Special Civil Suit No.49/98 came to be filed for declaration of this application as null and void, by Maria Elsa. The Custodian by his Order dated 21st April, 1999 allowed the said application and declared the southern half of the property as non-evacuee property for the purposes of the Act. An application was made on behalf of Ricardina on 28th April, 1999, for taking possession of the property. The same was allowed by Order dated 17th May, 1999 and the date for handing over the possession was fixed as 21st May, 1999. The possession panchanama was drawn on 21st May, 1999, confirming the handing over of possession. However, it is claimed by the State Government that the possession always remained with the Assistant Manager of evacuee property.

9. On 9th August, 1999, one Mr. Antonio Sequeira Coutinho Pereira, the present respondent no.3,

claiming to be the legal representative of Prof. Maria Elsa, submitted an application to the Custodian alleging that the earlier Order dated 21st April, 1999 declaring the southern half of the property as non-evacuee property, was bad in law and void ab initio. He, therefore, prayed to revoke the said Notification. Notice was issued to Ricardina in response to the said application and she claimed in her written reply that her application for restoration was considered by the Custodian strictly in keeping with the Order passed by this Court on 18th February, 1987 in C.R.A. No.54/96. However, by the impugned Order dated 14th February, 2000, the Government was pleased to declare the notification dated 21st April, 1999, as invalid, non est and null and void with immediate effect. This Order dated 14th February, 2000, was passed by the Government for the following reasons:-

(a) The Custodian had no authority in law to re-consider/review his own order dated 16th September, 1997, rejecting the application dated 5th November, 1995 submitted by Smt. Ricardina Silva; and

(b) When there was a title dispute pending before the competent court between the same parties, the

Custodian could not declare and issue the Notification dated 21st April, 1999.

10. It appears that while this petition was pending, Ricardina died on 22nd November, 2001, and, therefore, her legal representatives have been brought on record as petitioners. None of them are staying in Goa, or, for that matter, in India. As at present, from their addresses set out in the petition memo, it is clear that they are all presently residents of Portugal. All her children were born in Goa, but they are presently residents of Portugal. Prof. Maria Elsa died on 20th November, 1997, at the Government Medical College, Goa. The present respondent no.3 claims that by public will executed on 16th December, 1996, Prof. Maria Elsa has bequeathed all her moveable and immoveable property to him as he is the nephew and he has come on record as the plaintiff in Special Civil Suit No.154/93.

11. The following questions arise for our consideration in this petition:-

(a) Whether the application dated 11th May, 1995, submitted by Ricardina for restoration was ever decided

under Section 15 of the Act;

(b) Whether the Order dated 21st April, 1999, was passed without authority in law and was void ab initio;

(c) Whether the impugned Order dated 14th February, 2000, suffers from any errors apparent on the face of the record; and

(d) Whether respondent no.3 has any locus to contest the restoration application filed by Ricardina in respect of the southern half property that had gone to the share of Eurico, in the Inventory Proceedings No.957/1929 and the consent terms drawn on 20th June, 1930.

12. It would be necessary at this stage to deal with some of the provisions of the Act and the Rules framed thereunder. As per Section 2(aaa), "Custodian" means the Custodian appointed or deemed to be appointed under Section 4 and includes any Deputy or Assistant Custodian of evacuee property. Under Section 2(b),

"evacuee" means any person –

(i) who on account of Liberation of Goa, Daman and Diu, leaves or has on or after the relevant date, left Goa, Daman and Diu, for any place outside India; or

(ii) ....., or

(iii) who, during anytime before or after the relevant date, has been residing in any place outside India, and who for that reason was or is unable to occupy, supervise or manage in person his property in Goa, Daman and Diu, or whose property has ceased to be occupied, supervised or managed by any person, or is being occupied, supervised or managed by an unauthorised person.

13. Under Clause (c) of Section 2, "evacuee property" means any property of an evacuee (whether held by him as owner, or as a trustee or as a beneficiary, or as a tenant or in any other capacity), and includes any property –

(i) which has been obtained by any person from an evacuee after the relevant date, by any mode of transfer unless such transfer has been confirmed by the Custodian; or

(ii) which belongs to an intending evacuee and in respect of which a declaration is made under section 21.

14. Under Section 2(k) "relevant date" means the sixth day of December, 1961. Section 5 provides of declaration of evacuee property and Section 6 deals with vesting of the same in the Custodian, whereas Section 7 deals with the powers of Custodian to take possession of evacuee property vested in him. Section 15 deals with the procedure for restoration of evacuee property. Section 22 provides for appeals against the orders made under Section 5, Section 8 (2)(II), Section 18, Section 31 or Section 39 by the Custodian, to the Tribunal constituted under Section 22 A and the decision of the Tribunal shall be final. Under Section 37, the jurisdiction of the Civil Courts is barred in certain cases and Section 46 deals with rule-making powers.

15. The Goa, Daman and Diu Administration of Evacuee Property Rules, 1965, have been framed under Section 46 of the Act. Rule 14 deals with the procedure for restoration of property when an application is presented under Section 15 of the Act and Rule 15 deals with the conditions subject to which an order of restoration may be passed. It would be useful to reproduce the relevant provisions of Section 15 of the Act

and Rule 14 of the Rules. They read as under:-

> **"S.15. Restoration of evacuee property** –
>
> (1) Save as provided under section (3) and subject to such rules as may be made in this behalf, any evacuee or any person claiming to be an heir of an evacuee may apply to Government or to any person authorised by it in this behalf (hereinafter in this section referred to as the authorised person) that any evacuee property which has vested in the Custodian and to which the applicant would have been entitled if this Act were not in force, may be restored to him.
>
> (2) On receipt of an application under sub-section (1) Government or the authorized person, as the case may be, shall cause public notice thereof to be given in the prescribed manner, and after causing an inquiry into the claim to be held in such manner as may be prescribed, shall –
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> (a) if satisfied –
>
> (i) that the conditions prescribed by rules made in this behalf have been satisfied,
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> (ii) that the evacuee property is the property of the applicant, and
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> (iii) that it is just or proper that the evacuee property should be restored to him,
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> make an order restoring the property to the applicant, or
>
> (b) if not so satisfied, reject the application;
>
> Provided that where the application is rejected on the ground that the evacuee property is not the property of the applicant, the rejection of the application shall not prejudice the right of the applicant to establish his title to the property in a Civil Court, or

(c) if there is any doubt with respect to the title of the applicant to the property, refer him to a Civil Court for the determination of his title;

Provided that no order for the restoration of any evacuee property shall be made under this sub-section unless provision has been made in the prescribed manner for the recovery of any amount due to the Custodian in respect of the property or the management thereof."

"R.14 Procedure for restoration of property -

(1) An application for restoration of evacuee property shall be made to the Government or to any person authorized by Government in this behalf.

(2) The application shall contain the name of the person interested in the property sought to be restored and the facts on which the claim for restoration is based.

(3) The application shall be verified in the same manner as a plaint under the Code of Civil Procedure, 1908.

(4) Before any order is made on the application, the Government or the authorised person, as the case may be, shall cause an enquiry to be held through the Custodian or any other person.

(5)(a) On receipt of the application, the Government or the authorized person, as the case may be, shall cause a notice to be given to the party or parties names in the application and any other person who may otherwise appear to be interested in the property or the proceedings.

(b) A Public Notice of the application shall also be issued in a local daily or a weekly newspaper at the expense of the applicant."

16. Mr. Zaiwala, learned Senior Counsel appearing for the petitioners submitted that on rejection

of the restoration application dated 11th May, 1995, vide Order dated 16th September, 1997, passed by the Custodian of Evacuee Property, the petitioner Ricardina was at liberty to file suitable application at the proper time. On acquiring Indian Nationality on 21st April, 1993, she submitted a fresh application dated 9th January, 1998, for reconsideration of the earlier Order dated 16th September, 1997, by which the restoration application dated 11th May, 1995, was disposed of as not maintainable. The second application was submitted before the Custodian of Evacuee Property and it was allowed by the same Custodian of Evacuee Property on 21st April, 1999, without prejudice to any right that a person may claim or any court's directions in the matter. Consequent to this Order possession of the subject property was also handed over to Ricardina on 21st May, 1999, pursuant to the Order dated 17th May, 1999, passed by the Custodian. There was no power vested with the State Government to review/recall or set aside the Order dated 21st April, 1999, passed by the Custodian purportedly invoking the review powers under the Act, more so, when the Act does not provide for any review of the Order passed by the Custodian. The Custodian himself is an officer appointed under Section 4 of the Act and once he had passed an order of restoration on 21st April, 1999, the said Order could not have been recalled or withdrawn by the State Government. It was submitted that all the applications for restoration are required to

be considered and decided by the Custodian, who is an authorized officer of the State Government. Reliance in this regard has been placed on the provisions of Section 15(1) of the Act and Rule 15(2) of the Rules of 1965, as well as the Order passed by this Court in C.R.A.No.54/96. The impugned Order does not state with clarity under what Section of the Act the State Government has set aside the Order dated 21st April, 1999 and such a power has been tried to be explained by the affidavit in reply, which is not permissible. Even otherwise, Section 44 of the Act does not empower the State Government to pass an order setting aside the order of restoration passed by the Custodian declaring the property as non-evacuee and handing over the possession to its owner. The learned Senior Counsel also urged that the impugned Order is in breach of the principles of natural justice and on that count alone the impugned Order is required to be quashed and set aside.

17. The respondent nos.1 and 2 have filed affidavits in reply and opposed the petition. It has been stated on behalf of the State that:-

(a) The Notification dated 21st April, 1999, issued by the Custodian was without following the provisions of Section 15 of the Act and Rule 24 of

the Rules. He has no jurisdiction to revoke/review his own orders;

(b) On receiving the complaint dated 9th August, 1999, filed by the respondent no.3 report was called from the Custodian who submitted the same on 15th September, 1999 and pointed out the various illegalities while issuing the Notification dated 21st April, 1999 and recalling the earlier Order dated 16th September, 1997. The matter was scrutinized by the Government. It decided to revoke the said Notification dated 21st April, 1999, and at the same time it also proceeded to appoint a judicial commission for enquiring into the illegalities committed by the Custodian. The said commission appointed by Order dated 9th May, 2000, was headed by Hon'ble Justice Dr. E. S. Da Silva (retired);

(c) Under Section 44 of the Act the Government has the power to suo motu exercise revisionary jurisdiction

over the Orders passed by its officers by calling for the record and this power is applicable to correct any order that is passed in respect of the evacuee property, including its management, etc.

(d) The Government has acted fairly and before the impugned Order was passed the petitioner was issued a show cause notice and she submitted her defence statement. The power to be exercised under Section 15 of the Act cannot be exercised by the Custodian who has the powers only to pass an order under Section 5 of the Act, declaring the property as evacuee property. At the same time if he is nominated as an officer under Section 15 of the Act, the Custodian has the powers to decide an application for restoration of the evacuee property and, in the absence of such a specific Notification, the Custodian cannot be deemed to have such powers. In any case, the Custodian does not

> have the power to review his own orders, as such a power has not been provided under the Act, or the Rules thereunder.

Respondent no.2 has submitted that the Assistant Manager of the Evacuee Property submitted a report dated 5th June, 2000, and confirmed that the evacuee property was never handed over to the petitioner and the possession purportedly handed over on 20th May, 1999, was only a paper possession.

18. Mr. Nadkarni, the learned Advocate General submitted that the subject property having been declared as evacuee property under Section 5 of the Act by the Custodian, any application for restoration of the said property is required to be made under Section 15 of the Act and the said application is required to be decided by the State Government or an officer authorised specifically by the State Government. The Custodian who passed the Order dated 16th September, 1997, as well as the Order dated 21st April, 1999, was not an officer who was authorised by the State Government to exercise the powers under Section 15 of the Act. In addition, once the Order under Section 5 is passed by the Custodian, the said officer has the duty to manage and supervise the evacuee property. He cannot pass an order of restoration of the

property. The provisions of Rule 15 (2) of the Rules are required to be read in harmony with the scheme of Section 15 of the Act as well as Rule 14 of the Rules. The said provisions would be applicable only if the Custodian is an authorised officer and they cannot be read in isolation so as to hold that the custodian has the power to entertain and decide an application under Section 15 of the Act. It was further submitted that reasonable opportunity of hearing was given to the petitioner before the impugned Order was passed and, in any case, it was not that no opportunity of hearing was given to the petitioner. If on the admitted or undisputable factual position only one conclusion is possible and permissible, it is not necessary to issue a writ by allowing the petition, merely because there has been violation of the principles of natural justice. Non-compliance with the principles of natural justice, unless it is shown to cause prejudice does not automatically entitle the petitioner for relief under Article 226 of the Constitution. In some cases, the "useless formality theory" would be applicable and the same is also applicable in the present case. An order lacking jurisdiction need not be set aside if the result would be revival of an illegal order, is another argument advanced by Mr. Nadkarni, in support of his contention that even if the impugned Order did not mention specifically under which Section of the Act it was passed, that by itself would not be a reason to restore an illegal

Order dated 21st April, 1999 passed by the Custodian. In support of these contentions reliance has been placed on the following decisions:-

(i) **State Bank of Patiala & Ors. vs. S. K.Sharma,** ([1996] 3 SCC 364);

(ii) **Rajendra Singh vs. State of Madhya Pradesh & Ors.,** (1996[6] Supreme 658);

(iii) **M.C. Mehta vs. Union of India & Ors.,** ([1999]6 SCC 237);

(iv) **Maharaja Chintamani Saran Nath Shahdeo vs. State of Bihar & Ors.,** ([1999]8 SCC 16); and

(v) **Aligarh Muslim University & Ors. vs. Mansoor Ali Khan,** ([2000]7 SCC 529).

19. In the case of **Custodian, Evacuee Property, Punjab & Ors. vs. Jafran Begum,** AIR 1968 SC 169, it has been held that the Administration of Evacuee Property Act, 1950, framed by the Government of Indian is a complete Code in itself in the matter of dealing with evacuee property and it empowers the Custodian to determine that properties are evacuee properties. The scheme of the Act is similar to the scheme of the Administration of Evacuee Property Act, 1950 framed by the Parliament. There cannot be any dispute that once the Custodian passed an order declaring a property as evacuee property under Section 5 of the Act, the consequences follow and the administration of the property vests with him. He becomes the Custodian of Evacuee Property and has

the powers to take its possession. He is required to manage the property till it is restored and even after it is restored, he still has certain ancillary duties in respect of the said property to be discharged. The provision for restoration of the evacuee property is only under Section 15 of the Act. Sub-section (1) very specifically states that any evacuee or any person claiming to be an heir of an evacuee may apply to the Government or to any person authorised by it in this behalf, that an evacuee property which has vested in the Custodian and to which the applicant would have been entitled if this Act were not in force, may be restored to him. On receipt of such an application under Sub-section (1), the Government, or the authorised person, as the case may be, shall cause public notice thereof to be given in the prescribed manner and after causing an enquiry into the claim to be held in such manner as may be prescribed, shall, if satisfied that the conditions prescribed by the Rules made in that behalf have been satisfied that the evacuee property is the property of the applicant and that it is just and proper that the evacuee property should be restored to him, make and order restoring the property to the applicant and if not satisfied, reject the said application. In case there is any doubt with respect to the title of the applicant to the property, the issue has to be referred to the Civil Court for determination. The manner of the enquiry to be caused under Section 15(2) of

the Act has been set out under Rule 14 of the Rules. Sub-Rule (1) states that an application for restoration of evacuee property shall be made to the Government or to any person authorised by the Government in that behalf. As per Sub-Rule (2), the application shall contain the name of the person interested in the property sought to be restored and the facts on which the claim for restoration is based. As per Sub-Rule (3), the application shall be verified in the same manner as the plaint under the Code of Civil Procedure, 1908. Sub-Rule (4) states that before any order is made on the application, the Government or the authorized person, as the case may be, shall cause an enquiry to be held through the Custodian or any other person (emphasis supplied). Thus, on receipt of the application for restoration, the enquiry to be caused is through the Custodian or any other person. If the authorised person, within the meaning of Section 15(1) of the Act, or Rule 14(1) of the Rules is the Custodian, then the enquiry to be caused is required to be conducted by any other person. Mr. Zaiwala, learned Senior Counsel placed reliance on the provisions of Sub-Rule (2) of Rule 15 of the Rules in support of his contentions that the application submitted under Section 15 of the Act is required to be decided by the Custodian and not by the Government or any other person. The said Sub-Rule reads as under:-

> **"S.15(2)** Without prejudice to the generality of the provisions contained in Section 15 on the subject, a Custodian may while making an order for the restoration of evacuee property under that Section, impose any terms or conditions which he considers to be just and proper, having regard to the commitments already made, or action already taken by him in the exercise of his functions under the Act, or which otherwise seem to be necessary for carrying out the purpose of the Act."

The scheme of Sub-Rule (2) of Rule 15 has to be read in harmony with the provisions of Section 15 of the Act and Rule 14 of the Rules. It is possible that the Government may nominate the Custodian as the authorised officer/person and in that event if he proposes to pass an order for restoration, the scheme of Sub-Rule (2) of rule 15 of the Rules could operate and not otherwise. This provision cannot be read to hold that the Custodian is the authorised person eventhough there is no such Notification issued by the State Government under Section 15(1) of the Act or Rule 14(1) of the Rules. We, therefore, hold that an application for restoration is required to be decided either by the State Government or an authorised person and, in the instant case, there is nothing to controvert the statement made on oath by respondent no.1 that the Custodian at the relevant time was not an authorised person and no such Notification or Order was issued designating him as such an authorised person .

20. Ricardina had submitted the first application on 11th May, 1995, which was disposed off by

Order dated 16th September, 1997 and the second application was dated 9th January, 1998 for reconsideration of the Order dated 16th September, 1997. Both these applications did not contain the details as stated in Rule 14(2) of the Rules and were not verified in the same manner as a plaint under the Code of Civil Procedure, 1908, as required under Rule 14(3) of the Rules. This aspect was totally overlooked by the Custodian in addition to the fact that he had no such powers to entertain an application for restoration unless the State Government had specifically authorised him to do so. Both the Orders dated 16th September, 1997, as well as 21st April, 1999, do not indicate that they are passed under Section 15 of the Act. We have no doubt in our mind that both these orders were passed without authority of law and, therefore, they were void ab initio. When the Act and the Rules framed thereunder specify the procedure to apply and the manner and authority to decide the restoration application, it must be decided in that manner and by that authority alone.

21. It is true that the impugned Order dated 14th February, 2000, does not state as to under which Section of the Act the same has been passed. It shows that on receipt of the enquiry report the Government was satisfied that the Custodian had no powers to review his own orders and the title dispute between the parties was

pending before the Civil Court and, therefore, the Order dated 21st April, 1999, passed by the Custodian was unsustainable in law. The impugned Order was passed in public interest and more so the Custodian had patently erred in reviewing his own order dated 16th September, 1997 by which the application dated 5th November, 1995 was rejected. In the case of **H. C. Suman & Anr. vs. Rehabilitation Ministry Employees' Cooperative House Building Society Ltd., New Delhi & Ors.,** ([1991]4 SCC 485), it is held that a quasi-judicial order once passed and having become final, cannot be reviewed by the authority passing that order unless the power of review has been specifically conferred. In the case of **Dr. Kashinath G. Jalmi & Anr. vs. The Speaker & Ors.,** AIR 1993 SC 1873, it has been held that the exercise of discretion by the Court even where the application is delayed is to be governed by the objective of promoting public interest and good administration and on that basis it cannot be said that discretion could not be exercised in favour of interference where it is necessary to prevent continuance of usurpation of office or perpetuation of an illegality. The orders passed by the Custodian on the application submitted by Ricardina were nothing short of usurpation of office and perpetuation of an illegality. The Government thought it fit to prevent the consequences of such illegal orders by exercising its revisionary powers and in public interest.

22. Section 44 of the Act reads as under:-

> **"S.44. Power of Government to take action with regard to evacuee property -**
>
> Save as provided under Section 3, the Government may for the purpose of regulating or improving the administration of any property which has vested in the Custodian under the provisions of this Act, pass such order or direct such action to be taken in relation thereto, as in its opinion the circumstances of the case require and as is not inconsistent with any of the provisions contained in this Act."

This Section empowers the State Government to pass such orders in respect of the property vested in the Custodian as in its opinion the circumstances of the case require and is not inconsistent with any of the provisions contained in the Act. The bar is specific and that is only in respect of the orders which are not inconsistent with any of the provisions contained in the Act. When the State Government realised that the Custodian had entertained an application for restoration as well as a review application and allowed the said review application, it realized that illegal orders were being continued and on receiving the report submitted by the Custodian, it decided to recall the order of restoration passed on 21st April, 1999. In our considered opinion, the scheme of Section 44 is wide enough to empower the State Government to exercise its revisional jurisdiction against every order passed by any of its officers and,

therefore, the impugned Order cannot be held to be illegal on that count. When an officer of the State Government passes an illegal order or an order without legal powers, on an application submitted under the Act, the State Government cannot be said to be without powers to take corrective steps under the powers of revision and pass such order as the circumstances warrant for regulating or improving the administration of the property.

23. Though the Government record shows that the Custodian issued the notice to the Petitioner on receipt of the complaint dated 9.8.1999 against the order of restoration dated 21.4.1999 and the petitioner had submitted her say to the same, this exercise was part of an inquiry that was carried out by the Custodian under Rule 14(4) of the Rules. It has been admitted in the affidavits filed in reply by respondents No.1 and 2 that the said report was placed before the Government and in public interest, the impugned order dated 14.2.2000 came to be passed under Section 44 of the Act, after considering all the relevant issues including the title etc. and the power of the Custodian to review his own order. It is not in dispute that the petitioner was not granted a hearing nor was such notice issued to her by the Government before the impugned order was passed. One of the requirements under Rule 14(5) of the Rules is to issue a notice to the party or parties named in the application,

on receipt of an application for restoration and the said notice is required to be caused by the Government or the authorised person, so that the party or the parties named therein may appear and defend their case. This requirement of issuing notice is further re-enforced by the provisions of sub-section (2) of Section 15. The Government thus performs a quasi-judicial functions while deciding the application for restoration and, therefore, it is necessary that the application was heard before the impugned order was passed. This breach of the principles of natural justice would certainly vitiate the impugned order. It has been contended in the affidavit-in-reply that the Government has acted fairly and considered the relevant issues. This exercise of filling in lacunae does not meet the requirements of law. In this regard, the learned Senior Counsel for the petitioner rightly relied on the decision of the Supreme Court in the case of Gordhandas Bhanji, AIR 1952 SC 16, it was stated as under:

> "When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out."

This view has been reaffirmed by the Constitution Bench in the case of Mohinder Singh Gill and.

v. The Chief Election Commissioner, New Delhi and ors., AIR 1978 SC 851. We, therefore, hold that the impugned order dated 14.2.2000 passed by the State Government is unsustainable on the ground of breach of natural justice.

24. However, though the order dated 14.2.2000 is held to be unsustainable, that would not allow us to restore the earlier order dated 21.4.1999 passed by the Custodian, recalling his previous order dated 16.9.1997 and restoring the said property in favour of the petitioner. We have already held that the application of restoration is required to be heard and decided by the Government or an authorised person and the Custodian in the instant case was not such an authorised person. The Custodian passed the orders on 16.9.97 as well as on 21.4.1999, without authority in law and, therefore, they have been held to be illegal and void ab initio by us. In fact, there was no occasion for the petitioner to submit her application dated 9.1.1998 when her earlier application dated 11.5.1995 was disposed of by order dated 16.9.1997. Acquiring Indian Nationality by naturalism was not an issue germane to the liberty to file a fresh application, as noted in the order dated 16.9.1997 and, in any case, Ricardina had obtained Indian nationality, way back on 21.4.1993 i.e. much before the very first restoration application dated 11.5.1995 was filed by her. The learned Advocate General rightly placed reliance on

the decision of the Supreme Court in the case of Maharaja Chintamani Saran Nath Shahdeo (supra)in support of his contention that writ jurisdiction cannot be exercised to restore illegal orders. The learned Senior Counsel on the other hand, placed reliance on the order passed by this Court on 18.2.1997 in support of his contention that the order dated 21.4.1999 was passed by the Custodian in obedience of the said order of this Court and these submissions, including the submission that the doctrine of res judicata was applicable, do not commend to us. The order of this Court dated 18.2.1997 had recorded the submissions made by the respective parties and more particularly, the learned Counsel who represented the Custodian and directed to proceed to decide the application of restoration dated 11.5.1995. This Court was not informed about the powers of the Custodian and the State Government under the Act. This issue regarding restoration of the evacuee property did not fall for consideration and, therefore, it will have to be presumed by the Order dated 18.2.1997 that this Court directed that the said application to be decided as per law.

25. In the case of Sulochana Amma v. Narayanan Nair, AIR 1994 SC 152, the Supreme Court, on the doctrine under Section 11 of the C.P.C., stated thus:

> "Therefore, Section 11 is to be read in combination and harmony with Explanation

> VIII. The result that would flow is that an order or an issue which had arisen directly and substantially between the parties or their privies and decided finally by a competent Court or tribunal, though of limited or special jurisdiction, which includes pecuniary jurisdiction, will operate as res judicata in a subsequent suit or proceeding, notwithstanding the fact that such Court of limited or special jurisdiction was not a competent Court to try the subsequent suit. The issue must directly and substantially arise in a later suit between the same parties or their privies."

26. Now coming to the issue of title of the successor of respondent No.3 in respect of the subject-property, it is required to be noted that out of three suits filed by the said party, Special Civil Suit No.49/98 was dismissed for not disclosing any cause of action; whereas, Special Civil Suit No.1/96 was withdrawn. Both these orders were passed on 2.1.99 by the trial Court concerned and only the very first suit i.e. Special Civil Suit No.154/1993 is presently pending before the learned Civil Judge, Sr. Division, at Panaji. The said suit has been filed only on the ground that late Eurico de Noronha, the late husband of the petitioner failed to comply with the terms and conditions of the Will dated 17/18th April, 1929 and as maintained by the Consent Terms dated 20.4.1930 It is alleged that in the year 1959, Eurico de Noronha renounced his right bequeathed to him in the Will and came to live at Porvorim of Village Serula after constructing therein a house in the property known as "FONDEM PALMAR" and after liberation of Goa he went to

Portugal. Neither late Eurico nor his family members or heirs took any steps for performing the terms and conditions imposed by will and on the contrary, acted in breach of the same and, therefore, the southern half share of Mayem property which was allotted to Eurico by the consent terms dated 20.4.1930, could not be retained by him exclusively.

In the same suit, it has been clearly admitted that by the consent terms pursuant to the inventory proceedings, the estate on the count of Mayem was divided into the northern half and the southern half and the northern half estate of the count D. Jose was by consent distributed among all heirs and taken into account of his non-disposable half of the estate. Whereas, southern half of the estate of the count D. Jose was taken to be his disposable quota of his estate and in terms of the Will allotted to the said Eurico de Noronha Wolfango de Silva. Therefore, even when the suit was filed, the plaintiff did not hold any title in the property of late Eurico. The suit has been still pending for decision and after the demise of the original plaintiff, respondent No.3 has come on record as the successor by a public Will.

27. The property divided consequent to the inventory proceedings No.957/1929 and by the consent terms of 20.4.1930, has been specifically demarcated and

identified as per the plan attached to the inventory order. There was no uncertainty left in the identification of the property by name "Southern Lote of Mayem" and "Northern Lote of Mayem". Even when the Custodian had initiated proceedings under Section 5 of the Act in the year 1965, the original plaintiff and her husband had filed a reply. There were allegations recorded in the following words by the Custodian in his order dated 14.11.1967: "Dr. Fernando Bernardo de Noronha Wolfango de Silva and his wife have alleged in their written statement dated 8th November, 1964 that the parents of Dr. Fernando Bernardo died in Goa before liberation; that by virtue of the Will executed by D. Jose Joaquim de Noronha, count of Mayem and given effect to by the inventorio on 31.7.1930, the entire property of the said L. Jane Joaquim de Noronha was divided as per certificate of the Inventario: that under the said Will Eurico de Wolfango de Silva inherited the southern part of the Estate of Mayem and several other properties on certain conditions: that Eurico has not fulfilled the conditions of the Will hence the decision given effect in the said inventario is nullified and a new division is to be carried out: that the defendant No.1 (Fernando Bernardo de Noronha Wolfango de Silva) is the only heir of D. Jose now living in Goa and other heirs are either dead or living at unknown place and until they are proven to exist the administration of this property rightfully

belongs to the Defendant."

28. The Custodian also referred to the subsequent written statement dated 11.10.1965 in which the plaintiff and her husband had allotted for Eurico and his wife the southern half of the estate of Mayem as per the inventario and the other co-sharers have net 1/6th each of the northern half. He also noted from the written statement that "They have also written that they have no objection in the declaration of the southern half and 2/6 of the northern half as Evacuee Property." The statement made way back in 1965 clearly proved the exclusive title of Eurico in respect of the southern half property of Mayem Village on which the plaintiff and her husband had given no objection for declaration as evacuee property. The Custodian did not stop here alone. He proceeded to observe, as under, in the said order dated 14.11.1967, which has not been challenged and has attained its finality :

> "(a) It may be significant to note here that the only co-sharers of the property who are in India viz. Dr. Fernando Bernardo and his wife Mrs. Maria Ela Filomena have alleged in their written statement dated 11.10.1966 (para 11 to 13) that they have no objection to the declaration of the southern half and 2/6 of the northern half of the property being declared as evacuee property.
>
> (b) In her statement dated 11.6.1966, Mrs. Maria Elsa has been stated that she would adduce evidence regarding their

> 1/6th share in the landed property of Mayem Village.
>
> (c) There is also a statement of Dr. Eurico Bernardo and his wife dated 7.11.65 and in that written statement also these two persons have alleged that they are co-sharers of the northern part of the estate of Mayem and have right to 1/6th of the property.
>
> (d) I now pass on to the next question viz. the share of Dr. Fernando and his wife Mrs. Maria Elsa in the property in question. Admittedly, the southern half exclusively belonged to Eurico. Hence, the southern half is exclusive Evacuee property including the residential constructions etc. of Eurico, Dr Fernando Bernardo and his wife have nothing to do with the southern half of the property as indeed it has been admitted by them in their written statement discussed above.
>
> (e) It is, thus clear that the parents of Dr. Fernando Bernardo had only 1/6th share in the northern half of the property which was inherited by their six sons and daughters including Dr. Fernando. Dr. Fernando Bernardo and his wife therefore have got 1/36 share only in the northern half of the property in question.

29. In the operative portion of the order dated 14.11.1967, the Custodian held that the southern half of the property exclusively belongs to Mr. Eurico de Noronha e Silva and the same was exclusively the evacuee property. He further held that in the northern half 35/36th share was evacuee property belonging to the evacuee mentioned therein and the remaining of 1/36th share which went to Dr. Fernando and his wife Mr. Maria Elsa Filomena was not an evacuee property as they were staying in Goa after its liberation.

30. The consent terms of 1930 which are on record at Exhibit-T have specifically earmarked and identified the property at Village Mayem and belonging to the count and divided into equal parts i.e. southern half and northern half. Clause six, without any ambiguity sets out the description of the respective properties and clause seven independently describes the property in the northern half. Clause 9 of the said consent terms reads as under :

> "To the first party Eurico, was allotted the southern part of Mayem defined in the previous articles and to the second party who are the remaining interested parties the northern part which in the meanwhile they maintain in common, being both parts as has been said, of equal value, therefore, there is no place for owelty money."

Clause 11 of the consent terms is also required to be reproduced, as under :

> "They maintain fully the testamentory disposition and as common, as to the Chapel of Our Lady of Milagres, and the spring existing at Mayem, which is reserved for the use of all the heirs and agree that in case the first party, Eurico, sells the property in which the spring is situated, he should pay to the other interested parties a part of the price of the said spring proportionate to their hereditary share the value of which shall be fixed by arbitration in the absence of consent terms. In case the said Eurico sells the other properties of Mayem and does not reside therein the above referred chapel shall be handed

> over to the Administracao do Cabot da Se Primacial, along with all its assets and belongings."

This clause specifically sets out the consequences of certain failures or omissions or commissions at the hands Eurico and if regards be had to these consent terms which were not challenged for more than 30 years i.e. from 1930 to 1963, the successor of respondent No.3 cannot be said to have any title to the property of late Eurico, as at present and the applications made by respondent No.3 or his predecessor Mrs. Maria Elsa opposing the application of the petitioner for restoration of the evacuee property, were the applications made by LRs. and not by any sharers of the said property. Respondent No.3, therefore, cannot oppose the application for restoration of the property of late Eurico on the ground that he has a share in the said property.

31. Before we conclude, there is one facet of these proceedings which was highlighted by the learned Senior Counsel. Eurico had left India in May, 1962 and died in Portugal on 6.5.1965. The Custodian passed his first order under Section 5 of the Act on 25.6.1965 and the said order was set aside in appeal on or about 23rd/30th July, 1966. The second order was passed by the Custodian on 14.11.1967. As per the learned Senior Counsel, Eurico's property had already devolved on his

heirs and they were never issued notices nor were they heard by the Custodian. In this regard, he relied upon the following observations of the Constitution Bench in the case of Ebrahim Aboobaker and another v. Tek Chand Dolwani, AIR 1953 SC 298:

> "(16) It is obvious that property must be declared to be evacuee property under S. 7 before it can vest under S.8. There is no doubt that when the property does so vest the vesting takes effect retrospectively, but where the man dies before any such declaration is made, the doctrine of relation back cannot be invoked so as to affect the vesting of such property in the legal heirs by operation of law. To take a simple illustration, if a person leaves India after 1/3/1947, the date given in S. 2(d), and dies in Pakistan before any notice is issued to him under S. 7 and before any inquiry is held in pursuance thereof, it is obvious that the heirs, who have succeeded to his property, cannot be deprived of it by conducting an inquiry into the status of the deceased and investigating his right or interest in property which has already devolved on legal heirs. Section 8 in such a case will not come into play and there can be no vesting of the property retrospectively before such property is declared as evacuee property within the meaning of S.2(f) of the Act.
>
> (17) Reading ss. 7 and 8 together, it appears that the Custodian gets dominion over the property only after the declaration is made. The declaration follows upon the inquiry made under s.7, but until the proceeding is taken under S.7, there can be no vesting of the property and consequently no right in the Custodian to take possession of it. Now if the alleged evacuee dies before the declaration, has the Custodian any right to take possession of the property ? If he cannot take possession of the property

> of a living person before the declaration by the same token he cannot take possession after the death of the alleged evacuee when the property had passed into the hands of the heirs. The inquiry under S. 7 is a condition precedent to the making of a declaration under S.8 and the right of the Custodian to exercise dominion over the property does not arise until the declaration is made. There is no reason, therefore, why the heirs should be deprived of their property before the Custodian obtains dominion."

On the basis of the above observations made by the Apex Court it was contended that on the demise of Eurico, the Custodian had no right to declare his property as evacuee property as has been declared in the order dated 14.11.1967. We must note that this issue regarding the validity of the order dated 14.11.1967 cannot be examined in this petition and the said order has attained its finality, since last about more than 35 years. This is an issue which the petitioner may take up before the State Government in support of their application for restoration.

32. In the result, this petition is partly allowed and the Order dated 14th February, 2000, passed by the State Government, as well as the earlier Orders dated 21st April, 1999 and 16th September, 1997, passed by the Custodian are hereby quashed and set aside. It is declared that the application filed by Ricardina on 11th May, 1995, was not decided as required under Section 15 of the Act and if the legal representatives of Ricardina apply for hearing of the said application on merits within

a period of four weeks by taking steps to comply with the requirements of Rule 14(2) and (3) of the Rules, we direct the State Government to decide the said application afresh on its own merits. The restoration application may be decided as expeditiously as possible and preferably within a period of six months after compliance. We make it clear that the respondent no.3 has no title, as at present, to the share of Eurico in the southern half property i.e. the subject property.

33. Rule made absolute accordingly, with no order as to costs.

34. At this stage, learned counsel for respondent no.3 submitted an application for stay of the above order. We are satisfied that this application of respondent no.3 does not deserve to be allowed, more so because his predecessor's suit is initiated for the first time in 1992 when Eurico's property is finally earmarked and decided way back in 1930. The application is, therefore, rejected.

B. H. MARLAPALLE, J.

N. A. BRITTO, J.